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Supreme Court, U.S.
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92-1928

No.

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1992

Darryl Ray Evans,
Petitioner,
v.
United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Court Of Appeal Erroneously Fail To Apply The Rule Of Lenity As Required By This Court's Recent Opinion In United States v. Thompson/ Center Arms Co., 504 U.S. __, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992)?

2. Should This Court Resolve A Conflict Between The Circuits On The Degree Of Knowledge That The Government Must Prove In Order To Obtain A Conviction For Violation Of 26 U.S.C. § 5861(d)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

LOWER COURT OPINION.....2

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....8

REASONS FOR GRANTING THE WRIT.....9

CONCLUSION.....12

APPENDIX.....13

TABLE OF AUTHORITIES

Cases

Page

Morgan v. United States.....11
564 F.2d 803 (8th Cir. 1977)

United States v. Anderson.....11
885 F.2d 1248 (5th Cir. 1989)(en banc)

United States v. Evans.....2
978 F.2d 1112 (9th Cir. 1992)

United States v. Gonzalez.....11
719 F.2d 1516 (11th Cir. 1983)
cert. denied 104 S.Ct. 1312 (1984)

United States v. Harris.....11
959 F.2d 246 (D.C. Cir. 1992)

United States v. Mittleider.....11
835 F.2d 769 (10th Cir. 1987)
cert. denied 108 S.Ct. 1279 (1988)

United States v. O'Mara.....9, 10
963 F.2d 1288 (9th Cir. 1992)

United States v. Ross.....10
917 F.2d 997 (7th Cir. 1990)
cert. denied 111 S.Ct. 1078

United States v. Shilling..... 11
826 F.2d 1365 (4th Cir. 1987)
cert. denied 108 S.Ct. 777 (1988)

United States v. Thompson/Center..i, 6, 7
Arms Co.....8, 9
504 U.S. ___, 112 S.Ct. 2102,
119 L.Ed.2d 308 (1992)

United States v. Williams.....11
872 F.2d 773 (6th Cir. 1989)

TABLE OF AUTHORITIES

Other Authority

	Page
Title 26 U.S.C. § 5845(a)	2
§ 5845(b)	2, 8
§ 5861(d)	i, 3, 7, 9
Title 28 U.S.C. § 1254(1)	2
§ 1291	2
Supreme Court Rules, Rule 10.1(a)	10
Rule 10.1(c)	10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, DARRYL RAY EVANS, respectfully prays that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit filed on October 29, 1992, affirming the judgement of conviction entered by the United States District Court for the Central District of California.

LOWER COURT OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported in **United States v. Evans,** 978 F.2d 1112 (9th Cir. 1992).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That Court entered its order denying the petition for rehearing on January 5, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

26 U.S.C. § 5845(a) "Firearm.- The term 'firearm' means...(6) a machinegun."

26 U.S.C. § 5845(b) "Machinegun.- The term 'machinegun' means any weapon which shoots, is designed

to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include...any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

26 U.S.C. § 5861(d) "It shall be unlawful for any person...to... possess a firearm which is not registered to him..."

STATEMENT OF THE CASE

Petitioner was arrested on April 17, 1990 after agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") searched his home and seized a number of weapons which they believed to be illegally possessed. A three count indict-

ment was filed on May 1, 1990 charging Petitioner with violations of the National Firearms Act. A superseding indictment was filed on July 17, 1990 adding two additional counts. Count five of the superseding indictment alleged that Petitioner knowingly possessed a firearm, namely a "combination of parts from which a machinegun can be assembled...which firearm had not been registered to him..." This count involved a legal semi-automatic M-11 pistol possessed in the same apartment with a legal bolt assembly designed as a replacement part for an M-11 machinegun.

At trial the Government presented an ATF expert who showed a videotape to the jury of a test firing of the M-11 after he had modified it by replacing the closed bolt assembly with the open bolt assembly. He testified that the "...lever being pulled to the rear bolt

assembly - to the rear; letting it go" caused two rounds to fire. In the video-tape it is seen that the conventional curved metal trigger was not utilized; the two shots fired only by manually pulling back the open bolt assembly and manually releasing it.

At the close of the case the district court failed to instruct the jury that the Government had to prove that Petitioner was aware that the combination of the M-11 and open bolt assembly had characteristics that would require the combination to be registered. The Petitioner did not request such an instruction.

During deliberations the jury sent the following written question to the court: "Please define trigger as it pertains to the instructin (sic) on instruction #8 (B) machinegun." After

rejection of Petitioner's offer of a dictionary definition, and over the Petitioner's objection, the trial court answered the jury's question as follows: "In reply to your note # 2, a trigger is defined as anything that releases the bolt to cause it to fire."

The jury subsequently returned a verdict of guilty on count 5 related to the M-11 and parts, and found the Petitioner not guilty on the four other counts.

Following the Petitioner's conviction this Court decided **United States v. Thompson/Center Arms Co.,** 504 U.S. ___, 112 S.Cr. 2102, 119 L.Ed.2d 308 (1992), and Petitioner cited this decision in his reply brief for authority that the rule of lenity required reversal of Petitioner's conviction due to the trial court's overbroad definition

of the term "trigger", where Congress had failed to explicitly define the meaning and where there was no legislative authority to assist in understanding Congress' intentions. In addition, Petitioner argued that the trial court erred in failing to adequately instruct the jury on the degree of knowledge that the Government had to prove to obtain a conviction under 5861(d).

The Court of Appeal did not discuss the implications of **Thompson/ Center Arms**, asserting in footnote 2 of their opinion that the term "trigger" was not ambiguous. In addition, the Court of Appeal pointed out that the authority in the Ninth Circuit did not require the Government to present proof of a defendant's knowledge of the characteristics of the weapon that would alert him to the registration

requirement. The Court of Appeal therefore affirmed Petitioner's conviction.

SUMMARY OF ARGUMENT

In June 1992 this Court issued the **Thompson/Center Arms Co.** decision, in which it analyzed the term "made" as utilized by Congress in the National Firearms Act. In the instant case the Court of Appeal could find no legislative history in support of the definition of "trigger" that the trial court gave to the jury, so it clearly erred in disregarding this Court's conclusion in **Thompson/Center Arms Co.** that the rule of lenity must be applied under such circumstances. Where the term "trigger", as utilized by Congress in the definition of "machinegun" set forth in 26 U.S.C. § 5845(b), clearly has no plain, unambiguous, meaning, the Court of Appeal

was left with an ambiguous statute and it erroneously failed to follow the virtually indistinguishable decision of this Court in **Thompson/Center Arms Co.**.

On the issue of what proof of knowledge the Government must present to support a conviction for violation of 26 U.S.C. § 5861(d) the concurring opinion in **United States v. O'Mara,** 963 F.2d 1288, 1292-96 (9th Cir. 1992) sets forth the constitutional defect inherent in the Ninth Circuit's strict liability view of the statute, and the conflict among the circuits on the issue.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's opinion completely ignored this Court's decision in **Thompson/Center Arms Co.** on application of the rule of lenity. Where this Court's guidance on interpretation of

terminology in the National Firearms Act was ignored by the Ninth Circuit, this Court clearly has the duty to grant certiorari in this case to insure that the decisions of this Court are followed by a Court of Appeal. Rule 10.1(c), **Supreme Court Rules.**

This Court also has an interest in resolving conflicts among the circuits. Rule 10.1(a), **Supreme Court Rules.** Presently there are six circuits, including the Ninth Circuit, which hold that conviction of a defendant for possessing an unregistered firearm does not require the Government to prove that the defendant knew the characteristics of the weapon that brought it within the registration requirement. **United States v. O'Mara,** 936 F.2d 1288 (9th Cir. 1992); **United States v. Ross,** 917 F.2d 997, 999-1001 (7th Cir. 1990), **cert. denied,** 111 S.Ct. 1078;

United States v. Mittleider, 835 F.2d 769, 774 (10th Cir. 1987), **cert. denied,** 108 S.Ct. 1279 (1988); **United States v. Shilling,** 826 F.2d 1365, 1367-68 (4th Cir. 1987), **cert. denied,** 108 S.Ct. 777 (1988); **United States v. Gonzalez,** 719 F.2d 1516, 1522 (11th Cir. 1983), **cert. denied** 104 S.Ct. 1312 (1984); **Morgan v. United States,** 564 F.2d 803, 805-06 (8th Cir. 1977). There are three circuits that hold that the Government must present such proof. **United States v. Harris,** 959 F.2d 246, 259-261 (D.C. Cir. 1992); **United States v. Anderson,** 885 F.2d 1248, 1250-55 (5th Cir. 1989)(en banc); **United States v. Williams,** 872 F.2d 773, 774-77 (6th Cir. 1989). This Court should take this opportunity to resolve a conflict that has deeply divided the circuits.

CONCLUSION

For the reasons cited above it is respectfully submitted that a Writ of Certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: April 4, 1993

Respectfully submitted,

Gerald V. Scotti

GERALD VINCENT SCOTTI
Attorney for Petitioner
DARRYL RAY EVANS

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DARRYL RAY EVANS, a/k/a Derrick Savage, *Defendant-Appellant.*	No. 91-50306 D.C. No. CR-90-0339-KN-1 OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
October 5, 1992—San Francisco, California

Filed October 29, 1992

Before: Thomas Tang, Harry Pregerson, and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Criminal Law and Procedure/Evidence/Juries/Sentencing

Affirming a district court judgment and sentence for possession of an unregistered machine gun, the court of appeals held that, because knowledge is not an element of that offense, the government did not have to prove that appellant

knew the firearm he possessed was subject to a registration requirement.

Appellant Darryl Ray Evans was convicted by a jury of possessing an unregistered machine gun. Evans challenged the district court's instruction to the jury concerning the definition of "trigger." He also argued that the district court erred by failing to instruct the jury that he knew the firearm he possessed was subject to registration, and that the evidence was not sufficient to convict him.

[1] The court held that the district court's definition of trigger was consistent with the language of the statute and the intent of Congress. [2] In addition, the court held that lack of knowledge is not a defense to possession of an unregistered machine gun because under the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation. [3] Evans' contention that he did not know he possessed an aggregate machine gun was irrelevant. He was alerted to the likelihood of regulation by the label and the obvious dangerous character of his machine gun. Knowledge was therefore not an element of Evans' offense. [4] Similarly, there could be no ineffective assistance of counsel based on defense counsel's failure to move for judgment of acquittal at the close of the evidence. The evidence was sufficient to convict Evans. No prejudice resulted from defense counsel's failure to move for judgment of acquittal. [5] In addition, because the district court knew it had discretion to depart downward on the basis of aberrant behavior or limited culpability, the appeals court lacked jurisdiction to review the district court's discretionary refusal to depart downward from the guidelines.

COUNSEL

Gerald V. Scotti, Beverly Hills, California, for the defendant-appellant.

Matthew W. Frank, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

PREGERSON, Circuit Judge:

Darryl Ray Evans appeals his conviction and sentence for possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

BACKGROUND

Evans was charged in a superseding five count indictment with violations of the National Firearms Act ("NFA"). The jury acquitted Evans on four of the five counts but convicted him on the fifth. Count five charged Evans with violating 26 U.S.C. § 5861(d), possession of an unregistered machine gun.[1] Evans raises several challenges to his conviction and sentence. We discuss each in turn.

[1]Evans possessed an M-11/9mm semi-automatic pistol ("M-11 pistol") and a fixed-firing pin bolt assembly labeled "M-11 SMG." The pistol and the bolt assembly constitute a machine gun within the meaning of 26 U.S.C. § 5845(a)(6). That section defines a machine gun as

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include . . . *any combination of parts from which a machine gun can be assembled* if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphasis added).

ANALYSIS

I. Jury Instructions

A. Definition of Trigger

Evans contends the district court erred when it defined trigger as "anything that releases the bolt to cause . . . [the weapon] to fire." During jury deliberations, the jury foreman had asked the court to define the term trigger for purposes of 26 U.S.C. § 5845(b).

Evans objected to the district court's definition and renews his objection on appeal. We find no error in the district court's instruction on this issue.

[1] Whether a jury instruction misstates the elements of an offense is a question of law that we review de novo. *United States v. Armstrong*, 909 F.2d 1238, 1243 (9th Cir.), *cert. denied*, 111 S. Ct. 191 (1990). We conclude that the district court's definition of trigger was consistent with the language of the statute and with Congress's intent. *See Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (discussing purposes of NFA).

The district court's definition comports with the structure and language of the NFA by focusing on the action that enables a firearm to shoot automatically without manual reloading. The legislative history of the NFA provides further support for the definition of trigger given by the district court. *See United States v. Peterson*, 475 F.2d 806, 810-11 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973).[2]

[2]Evans argues on appeal that the plain meaning of trigger in 28 U.S.C. § 5845(a)(6) is a curved metal trigger. This argument is without merit because it defines trigger completely out of context. As used in § 5845(a), "by a single function of the trigger" describes the action that enables the weapon to "shoot . . . automatically . . . without manual reloading," not

B. Knowledge Requirement

Evans argues that the district court erred by failing to instruct the jury that the government must prove that Evans *knew* the firearm he possessed was subject to a registration requirement. We disagree.

Evans neither requested nor objected to the absence of a knowledge instruction at trial. Consequently, we review for plain error. *See* Fed. R. Crim. P. 30 and 52(b); *see also United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989). Plain error exists if the error was highly prejudicial and there is a high probability that the error affected substantial rights. Fed. R. Crim. P. 52(b); *United States v. Bryan*, 868 F.2d 1032, 1038-39 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989).

[2] As a general rule, knowledge that a firearm is subject to a registration requirement is not an element of the offense of possessing that firearm. *United States v. O'Mara*, 963 F.2d 1288, 1291 (9th Cir. 1992). The government need only show that (1) the defendant knew he possessed a firearm (in this case, a machine gun as defined in § 5845(a)(6)); and (2) the machine gun is unregistered. Lack of knowledge is not a defense to possession of an unregistered machine gun because "[u]nder the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation." *O'Mara*, 963 F.2d at 1291.

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the "trigger" mechanism. Further, Evans' definition would lead to the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing.

In addition, Evans argues that the rule of lenity applies in his favor. We disagree. The touchstone of the rule of lenity is statutory ambiguity. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The term trigger is not ambiguous. Consequently, the rule of lenity does not apply. *Moskal v. United States*, 111 S. Ct. 461, 465 (1990).

We recognize two narrow exceptions to this general rule that knowledge is not an element of the offense of possessing an unregistered firearm. The first exception applies if there are *no external indicia* to indicate the likelihood of regulation. *United States v. Herbert*, 698 F.2d 981, 987 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983) (an internally modified semi-automatic machine gun). The second exception arises where a firearm is inoperable and *obviously not dangerous*. *United States v. Kindred*, 931 F.2d 609, 612 (9th Cir. 1991) (an inoperable World War I vintage German machine gun). The touchstone of these exceptions is that the weapons involved did not alert their owners to the likelihood of regulation.

These exceptions do not apply in Evans' case because the M-11 pistol and bolt assembly had external indicia alerting Evans to the likelihood of regulation. Specifically, the bolt assembly had attached to it a label reading "M-11 SMG," a common abbreviation for submachine gun. Furthermore, the M-11 pistol was fully operable and clearly dangerous even without the bolt assembly.

[3] Evans' contention that he did not know he possessed an aggregate machine gun is irrelevant. Evans was alerted to the likelihood of regulation by the label and the obvious dangerous character of his machine gun. Knowledge was therefore not an element of Evans' offense.

II. Sufficiency of Evidence and Ineffective Assistance of Counsel

Evans argues that the evidence was not sufficient to prove that he knew he possessed a firearm that was subject to regulation. The argument fails. Knowledge is not an element of 26 U.S.C. § 5861(b), and Evans does not fall within the narrow exceptions of *Herbert* and *Kindred*.

[4] Similarly, there can be no ineffective assistance of counsel based on defense counsel's failure to move for judg-

ment of acquittal at the close of the evidence. The evidence was sufficient to convict Evans. No prejudice resulted from defense counsel's failure to move for judgment of acquittal. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

III. Downward Departure from Guidelines Sentence

Finally, Evans contends that the district court erroneously believed it lacked authority to depart downward from the federal sentencing guidelines based on either aberrant behavior or limited culpability. The argument is without merit.

[5] The record shows that the district court knew that it had discretion to depart downward on either of these grounds. The court concluded that departure was not warranted. We do not have jurisdiction to review a district court's discretionary refusal to depart downward from the guidelines. *United States v. Sanchez*, 914 F.2d 1355, 1363 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991); *United States v. Morales*, 898 F.2d 99, 103 (9th Cir. 1990).

CONCLUSION

Evans' conviction and sentence are AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 91-50306
Plaintiff - Appellee,	D.C. No. CR-90-0339-KN-1
v.	O R D E R
DARRYL RAY EVANS, a/k/a Derrick Savage,	
Defendant - Appellant.	

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Superseding Indictment Filed July 17, 1990

COUNT FIVE

[26 U.S.C. § 5861(d), 5872]

On or about April 17, 1990, in Los Angeles County, within the Central District of California, defendant DARRYL RAY EVANS, aka Derek Savage, knowingly possessed a firearm, namely the following combination of parts from which a machinegun can be assembled: a M11/9mm pistol, serial number 88-0011951, together with a fixed firing pin bolt assembly, which firearm had not been registered to him in the National Firearms Registration and transfer Record.

The Grand Jury further alleges that the above-described firearm is subject to forfeiture pursuant to the provisions of Title 26, United States Code, Section 5872.

A TRUE BILL

CERTIFICATE OF SERVICE BY MAIL

I, Barry Feldman, certify that a three copies of:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

were served on counsel for the United States of America addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Terre Bowers
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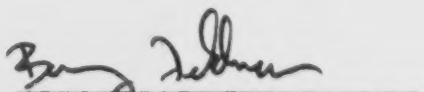
312 N. Spring Street
Los Angeles, CA 90012

by first class U.S. Mail.

Executed this 4th day of April, 1993.



BARRY FELDMAN